No. 80-235

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CORNELIA CRENSHAW,
Plaintiff-Appellant,

vs.

HONORABLE RAY BLANTON,
Governor of Tennessee; and
GENTRY CROWELL,
Defendants-Appellees.

On Appeal from the Supreme Court of Tennessee

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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MOTION OF APPELLEES TO DISMISS OR AFFIRM

The Appellees, Honorable Ray Blanton and Gentry Crowell, respectfully move to dismiss or affirm the judgment of the Supreme Court of the State of Tennessee, Rule 16, Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

The instant action was filed in the Tennessee state courts as an election contest, contesting the results of the March 7, 1978 referendum on the constitutional amendments proposed by the Limited Constitutional Convention of 1977. Appellant has attacked this referendum on numerous grounds, only two of

which are relevant to the instant appeal: (1) the alleged failure of the Governor to sign the call for the constitutional convention (Chapter 848, Public Acts of 1976); and (2) the alleged failure of the Speakers of the House and Senate to sign this call while the General Assembly remained in session. In the Davidson County Chancery Court the Plaintiff (Appellant here) filed a motion for summary judgment, citing these two grounds. This motion was dismissed with the Chancellor finding that there remained questions of law and fact with respect to these issues.

Prior to the decision on the motion for summary judgment, the Defendants propounded interrogatories pursuant to the Tennessee Rules of Civil Procedure. Despite repeated orders compelling discovery, the Chancellor found Plaintiff's answers to the interrogatories to be insufficient and dismissed the case.

Plaintiff thereafter appealed to the Supreme Court of Tennessee, pursuant to the statutes governing election contests, T.C.A. § 2-17-101, *et seq.* The cause was transferred to the Court of Appeals where Plaintiff raised only the issue of the Chancellor's denial of her motion for summary judgment. This action of the Chancellor was affirmed by the Court of Appeals. (Opinion p. 11). Yet, while affirming the decision of the Chancellor denying Plaintiff's motion for summary judgment, the Court of Appeals included in its opinion a substantial amount of dicta dealing with the issues in Plaintiff's summary judgment motion, and expressing the view that the Governor is required to sign all calls for constitutional conventions. (Opinion pp. 8-11).

The Supreme Court of Tennessee, on May 19, 1980, denied the Appellant's application for permission to appeal in this cause. Appellant thereafter, citing as basis of jurisdiction, 28 U.S.C. § 1257(2), appealed to this Supreme Court, allegedly arguing that the constitutional amendments of the Tennessee Constitution, recently ratified by the voters of Tennessee, are in violation of the United States Constitution.

MOTION TO DISMISS

The Appellees hereby move to dismiss the appeal on the grounds that this Court lacks jurisdiction to hear this cause. In support of this motion the Appellees would argue as follows:

I.

The Appellant Is Not Appealing From A Final Judgment.

Plaintiff is not properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(2). That statute provides as follows:

> "*Final judgments* or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, *and the decision is in favor of its validity.*" (Emphasis added).

As stated on page two of Appellant's jurisdictional statement, this appeal arises from a denial of appellant's motion for summary judgment in Chancery Court. The Court of Appeals of Tennessee upheld the denial, and the Supreme Court of Tennessee refused to grant certiorari. The opinion of the Court of Appeals, Appendix A, page 13, states as follows:

> "The plaintiff, Cornelia Crenshaw, has appealed from the Chancellor's decree dismissing her suit challenging the validity of Chapter 848, Public Acts of 1976 . . .
>
> "The immediate precipitating cause of the dismissal was plaintiff's failure to properly respond to defendant's demand and the Chancellor's order for discovery. Appellant

> makes no question of the final action of the Chancellor, but asserts as error the previous action of the Chancellor in overruling plaintiff's motion for summary judgment."

Numerous state cases support the proposition that a ruling on a motion for summary judgment is not a trial on the merits, but is instead a determination of whether a triable issue in fact exists. See, e.g., *Conley* v. *Hall,* 395 S.W.2d 575 (Ky. 1965); *Reed* v. *Kaydon Engineering Corp.,* 196 N.W.2d 487 (Mich. 1972); *Cook* v. *Schiff,* 279 N.Y.S.2d 585, 28 A.D.2d 514 (N.Y. 1967); *Reed* v. *Davis,* 399 P.2d 338 (Wash. 1965); *Horst* v. *Kraft,* 231 A.2d 674 (Md. 1967); *Eaton* v. *Miller,* 250 A.2d 220 (Me. 1969). The denial of a motion for summary judgment is not a decision on the issue requiring trial. *Moyer* v. *Moyer,* 134 A.2d 649 (D.C. 1957); *Hays* v. *Sullins,* 442 S.W.2d 494 (Tex. 1969); *Snelwar* v. *Snelwar,* 212 N.Y.S.2d 882, 27 Misc.2d 933 (N.Y. 1961). An order denying summary judgment decides only that questions of fact exist to be determined at trial. *Swanson* v. *Ridge Tool Co.,* 178 N.E.2d 255 (Ohio 1961); *West* v. *West,* 387 P.2d 686 (Utah 1963).

Appellant's motion for summary judgment was denied, whereupon appellant refused to comply with the Chancellor's discovery order and failed to proceed properly to trial, resulting in the dismissal of appellant's suit. Appellant cannot now be heard to challenge the dismissal, based upon a ruling on a motion for summary judgment which did not constitute a final judgment. Appellant, in essence, is challenging the ruling on her motion for summary judgment, which ruling did not amount to a final judgment as required for appeal under 28 U.S.C. 1257(2). Furthermore, whereas appellant's suit was dismissed for failure to comply with a discovery order, there was no final decision "in favor of [the statute's] validity," as is also required under 28 U.S.C. § 1257(2).

II.

The Decision Was Based On An Independent State Ground

At any rate, the Court of Appeals indicated that, because of the appellant's failure to produce reliable evidence, there remains an undetermined issue of fact as to whether the bill actually was presented to the Governor, (Appendix A, p. 23), and when it was signed in the Senate (Appendix A, p. 17).

The appellant, during the hearing on the motion, failed to offer reliable proof that the bill was not presented to the Governor. Such issues of fact are to be determined in the trial court, not on appeal to the Supreme Court. See, e.g., *United States* v. *Johnston,* 268 U.S. 220, 227; *Graves Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275; *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635. Because of appellant's failure to properly present her case before the Chancellor, her suit was dismissed without a ruling on the merits of whatever federal question she raised. Thus, there was an independent, non-federal basis for dismissal of appellant's suit and affirmance of that dismissal.

III.

The Question Presented To This Court Has Not Been Presented To The State Courts Below

No court has ruled on the federal question appellant raises. When the highest state court fails to pass upon a federal question, it is assumed that the omission is due to appellant's failure to properly present the question in the state courts. Appellant, under Supreme Court Rule 15(1)(d), has the burden of showing how and when the federal question was properly raised at both the trial and the appellate courts. See, e.g., *Street* v. *New York,* 394 U.S. 576, 582; *Bailey* v. *Anderson,* 326 U.S. 203, 206-207. Appellant surely cannot show, in light of her failure to properly proceed at trial, that her federal question was properly raised.

IV.

The Federal Question Presented Below Is Not Substantial

Appellant has failed to show that her federal question is substantial. Even if the bill to authorize the referendum was not signed by the Governor, the referendum was nonetheless properly conducted, and the convention's proposals were properly passed. Other than the mere allegation that her due process rights were violated, appellant has not shown in what manner the act to which she objects violates those rights. Supreme Court Rule 15(1)(e) provides as follows:

> "(e) If the appeal is from a state court, there shall be included a presentation of the grounds upon which it is contended that the federal questions are substantial . . . [which] shall include the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution."

Appellant has alleged some supposed violations of state law, for which she offered what was, at best, inconclusive proof at the trial court. As an afterthought, the appellant states, without citing any authority and without giving any presentation as to substantiality of or grounds for her claim, that it is clear "from prior decisions of the Supreme Court of the United States," whatever these may be, that passage of the Act in question deprives the citizens of Tennessee of their Fourteenth Amendment rights. This presentation certainly does not meet the requirements of Rule 15(1)(e).

V.

There Is No Denial Of Federal Due Process.

It is well accepted that federal courts must "not overstep the boundaries which limit its own jurisdiction." *Luther* v. *Borden,* 48 U.S. 1, 12 L.Ed. 581 (1849). See also, *In Re: Duncan,* 139

U.S. 449, 35 L.Ed. 219, 11 S.Ct. 573 (1891). It is further accepted that federal courts must accept the construction of state's statutes by state courts. See, *Montana* v. *Rice,* 204 U.S. 291, 51 L.Ed. 490, 27 S.Ct. 281 (1907); *Coleman* v. *Alabama,* 399 U.S. 1, 26 L.Ed.2d 387, 90 S.Ct. 1999 (1969); *Hortonville Joint School District* v. *Hortonville Education Association,* 426 U.S. 482, 49 L.Ed.2d 1, 96 S.Ct. 308 (1976).

The question of whether the governor must sign the call for the constitutional convention is one for interpretation by the state courts. It is the position of the appellees that for this Court to consider this matter, this Court must find that the state courts had made a decision that the constitutional amendments were validly enacted. This is an interpretation of a state constitutional provision by the state supreme court. There is no federal constitutional requirement that calls for a constitutional convention must be signed by the governor, or that the speakers must sign this call while the General Assembly remains in session. Appellant must argue, for this Court to hear this matter, that the alleged failure of the constitutional amendment to be properly signed by the speakers of the relative Houses and by the governor, violates established Tennessee law and, therefore, that due process is denied to the citizens of Tennessee since such amendments were not enacted pursuant to the requirements of established Tennessee law. This is not a federal question. Appellees would repeat their insistence that the question of whether state law had been violated has not been decided, and if this Court decides that it has been decided, by implication, it must be inferred that the State Supreme Court has decided that the constitutional provision regarding amending the state constitution had not been violated. The state courts would have then interpreted their state constitution. There is no federal constitutional due process requirement that the call be signed by the governor and, therefore, the question is without merit.[1]

[1] Appellant cites *Taylor* v. *Becham,* 178 U.S. 158, 44 L.Ed. 1187, 20 S.Ct. 890 (1900) in support of his argument that due process has been denied here. Appellees have perused this case and find no support for appellant therein. In fact, the case supports appellee's position as it determines in this election contest that the situation is one belonging to the state supreme court for a decision.

CONCLUSION

Since no federal question is presented; since Appellant has shown no substantial federal question to exist; since Appellant is not appealing from a final judgment; since the decision of the state courts was based on an independent state ground; and since the question presented here has not been presented to the courts below, the Appellees would respectfully request that this appeal either be dismissed or affirmed.

Respectfully submitted,

WILLIAM W. HUNT, III
Assistant Attorney General

Acknowledgement is given to Richard L. Colbert, graduate of the University of Tennessee, College of Law, who has assisted in the preparation of this Motion.

CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing Motion of Appellees to Dismiss or Affirm, has this date been forwarded by first class, postage paid mail, to attorney for the Appellant, Mr. Hubert D. Patty, Attorney at Law, P. O. Drawer L, Maryville, Tennessee 37801, this 12th day of September, 1980.

WILLIAM W. HUNT, III
Assistant Attorney General